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No. 83-1065.

In the Supreme Court of the United States.

OCTOBER TERM, 1983.

THE COUNTY OF ONEIDA, NEW YORK AND
THE COUNTY OF MADISON, NEW YORK,
PETITIONERS,

v.

THE ONEIDA INDIAN NATION OF NEW YORK STATE,
A/K/A THE ONEIDA NATION OF NEW YORK, A/K/A
THE ONEIDA INDIANS OF NEW YORK; THE ONEIDA
INDIAN NATION OF WISCONSIN, A/K/A THE ONEIDA
TRIBE OF INDIANS OF WISCONSIN, INC.;
THE ONEIDA OF THE THAMES BAND COUNCIL;
AND THE STATE OF NEW YORK.
RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Reply Brief of Petitioners.

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Introduction.

Petitioners the County of Oneida, New York, and the County of Madison, New York ("the Counties"), submit this brief in reply to the Briefs in Opposition filed by respondents the Oneida Indian Nation of Wisconsin, the Oneida Indian Nation

of New York, and the Oneida of the Thames Band Council ("respondents").[1]

Argument.

I. The Judgment Below Will Have Significant and Far-Reaching Consequences Which Warrant Prompt Review by This Court.

As set forth in the Counties' petition at 9-15, the decision below, if not reversed, will have an enormous impact on property owners and governments throughout the eastern United States. Respondents, however, contend that the practical consequences of that decision will be so insignificant that the ruling is not worthy of the consideration of this Court. In essence, respondents make four contentions.

First, and in stark contradiction to their avowed purpose of spurring Congressional action and large settlements, respondents disingenuously attempt to argue that this is but a minor dispute over a small amount of property: "This suit involves only title to 871.92 acres claimed by two counties and $16,694.00 in trespass damages owed by New York State, *nothing more*." Jt. Opp. Br. at 19 (emphasis added). In other words, respondents would have this Court believe that this matter has been in litigation for nearly 14 years, including dozens of days of trials, hearings, and appellate argument (in this Court as well as the Court of Appeals), involving the total expenditure of hundreds of thousands of dollars in counsel fees and costs for six parties, in order to recover sixteen thousand dollars and "nothing

[1] The joint brief in opposition filed by the first two respondents will be cited as "Jt. Opp. Br.," and that of the third respondent will be cited as "Opp. Br."

more." That argument flies in the face of both common sense and respondents' repeated characterization of this as "test case," which indeed was the view of the court below. *See* Supplemental Appendix, at 3a.

Second, respondents argue that further disruptions, such as eviction, "will not *inevitably* ensue from the lower court's decision without further litigation," despite the fact that two separate suits are presently pending in the District Court, including one seeking ejectment against 23 landowners. Jt. Opp. Br. at 19 (emphasis added). According to respondents, ejectment would not be "inevitable" primarily because the court has discretion in determining appropriate relief. *Id.* The essential problem with that argument is that it is difficult to state what, if any, binding legal constraints might exist on the discretion of a District Judge in determining whether to order the ejectment of an adjudged trespasser. Furthermore, respondents and other Indian plaintiffs are aggressively seeking such relief in the other cases they have brought in reliance upon this as a test case. With respect to the issue of further damages, it is clear from their repeated "reservations of rights" in this case that respondents are not conceding for a moment that they are not entitled to trespass damages from 1795 to 1967 and from 1970 to the present; if they are so entitled, enormous disruptions — financial, if not physical — are close at hand.[2]

[2] Respondents also point to their purported "restraint" thus far as evidence that no economic disruption is intended. Jt. Opp. Br. at 21 n.16. The Counties submit that they are entitled to somewhat more security than vague promises from adversarial parties who stand to recover billions of dollars if they are ultimately successful. In any event, respondents' so-called "restraint" has not been in evidence in other litigation, such as in their suit seeking damages and to be "restored" to "immediate possession" of a five to six million acre tract of land in New York State. *See Oneida Indian Nation of New York* v. *New York*, 691 F.2d 1070 (2d Cir. 1982).

Third, respondents state that titles in the claim area would remain clouded, even upon the dismissal of this litigation, because the United States might prosecute such a claim and because "[i]ndividual tribal members could raise the title issue as a defense in a trespass action against them." Jt. Opp. Br. at 20. As for the former, it has not happened yet, and may never; indeed, the United States has thus far expressly refused to prosecute such a suit. As for the latter, respondents apparently suggest that individual Indians may one day forcibly "retake" possession of land in the subject area. Any such act would be flatly contrary to the express dispute resolution provisions of the Treaty of Canandaigua, 7 Stat. 44, art. VII, and the express removal provisions of the Trade and Intercourse Acts, presently codified at 25 U.S.C. § 180, both of which require an appeal to the Executive.

Finally, respondents argue, with remarkable candor, that this Court should refuse review in order to preserve the leverage they have achieved in settlement negotiations, here and elsewhere. Jt. Opp. Br. at 20-23. In a sentence laden with irony, they contend that as a result of litigation such as this, "Congress and other interested parties at long last came to appreciate the desirability of resolving the claims through a fair settlement implemented by federal legislation." Jt. Opp. Br. at 22; *see* Opp. Br. at 8. In other words, this lawsuit, and its progeny, are intended only to force large settlements. The Counties respectfully submit that such a position is not worthy of the solicitude of this Court. The Counties and the other innocent landowners (who are not even alleged to have violated the laws in question) and the federal courts deserve better than to be made pawns in a game of pressure politics.[3]

[3] Moreover, notwithstanding respondents' suggestions to the contrary, settlement of the numerous Oneida cases is *not* likely — not because of the petitioners, but due to the Oneidas themselves. Respondents are so intensely and intractably factionalized that the Department of the Interior has been unable to certify an authoritative tribal government for years. *See Oneida Indian Nation of New York* v. *New York*, 520 F.Supp. 1278, 1285 n.6 (N.D. N.Y. 1981), *rev'd on other grounds*, 691 F.2d 1070 (2d Cir. 1982). Under these circumstances, any "settlement" would only invite further litigation. *Cf. James* v. *Watt*, 716 F.2d 71, 77 (1st Cir. 1983), *petition for cert. filed*, 52 U.S.L.W. 3325 (U.S. Oct. 25, 1983) (No. 83-623) (dissident faction of alleged Gay Head tribe fighting with separate faction then in process of settling land claim).

II. The Issues of Law Presented by This Petition Are Not "Unremarkable," But Are Truly Novel and Deserve Review by This Court.

Respondents state that the decision of the Court of Appeals is "supported by long-standing precedent of this Court involving familiar principles of law," and that its decision was therefore "unremarkable." Jt. Opp. Br. at 8; *see* Opp. Br. at 9. The Counties have previously summarized the underlying issues of law and add only the following in reply to points argued by respondents with respect to the issues of whether respondents have a cause of action under federal law and the applicability of the political question doctrine.

Respondents attempt first to suggest that this Court somehow ruled in 1974 that a cause of action existed, and that therefore "a second look is not warranted." Jt. Opp. Br. at 9. That is simply untrue. This Court's 1974 decision held that federal question jurisdiction existed, and did not reach the issue of the substantive underlying claim except to hold that it was not frivolously asserted. 414 U.S. 661, 675 (1974).[4]

[4] This Court often assumes that a cause of action is stated for purposes of determining other issues. *Compare, e.g., Burks* v. *Lasker*, 441 U.S. 471, 475-476 (1979) (Court assumed, without deciding, that an implied right of action existed under the Investment Advisers Act of 1940 ("IAA") for purposes of determining issue of whether state or federal law governed power of corporation's disinterested directors to terminate derivative suit) *with Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11 (1979) (Court later held that no private right of action for damages could be implied under the IAA).

Respondents then cite six decisions from this Court as authority for the proposition that this case involves well-settled principals of law. Jt. Opp. Br. at 9-10. Not one of those decisions, however, is on point. Two involve actions brought by the United States. *See United States* v. *Santa Fe Pacific R. Co.*, 314 U.S. 339 (1941); *United States* v. *Candelaria*, 271 U.S. 432 (1926).[5] Two others involve state law actions brought by individual Indians. *See Bunch* v. *Cole*, 263 U.S. 250 (1923); *Fellows* v. *Blacksmith*, 60 U.S. 366 (1857). Another involved a state law action brought by a non-Indian. *See Marsh* v. *Brooks*, 49 U.S. (8 How.) 223 (1850). The only case of the six even involving a tribal plaintiff in a federal court, *Creek Nation* v. *United States*, 318 U.S. 629 (1943), was brought in the Court of Claims under a statute specifically authorizing the filing of such a suit. In short, this Court has never considered (1) whether a federal common law action such as this may be brought by a tribal plaintiff or whether it is pre-empted by the Trade and Intercourse Act, or (2) whether a private right of action may be implied under that Act.[6]

Respondents try to avoid the first of these issues, whether any such common law was preempted, by focusing solely on the land conveyance provision included in the Trade and Inter-

[5] As this Court recently made clear, even a statutory right to sue "in behalf of" another entity does not imply that a federal right of action exists for that entity to sue in its own name. *Daily Income Fund, Inc.* v. *Fox*, U.S. , 104 S.Ct. 831, 78 L.Ed.2d 645 (1984). This has long been true of the respective rights of the United States and Indians on whose behalf it may sue. *See United States* v. *Minnesota*, 270 U.S. 181 (1926).

[6] The Court in *Creek Nation* v. *United States* observed in dictum that the tribal plaintiffs had, in addition to a statutory right to sue, "a general legal right . . . to bring actions on their own behalf." 318 U.S. at 640. It is a long step, indeed, from asserting that "a tribe may bring an action" to asserting that "a tribe may bring a federal common law action for damages in federal court irrespective of the preemptive effect of the remedial provisions of the Trade and Intercourse Act."

course Act. This provision *never* stood alone; it was always enacted as a part of a much larger, comprehensive scheme for regulating Indian affairs. F. Cohen, Handbook of Federal Indian Law 70-71, 73 (1942). In particular, it always was enacted in conjunction with a provision giving the President exclusive authority to remove persons unlawfully settled on Indian lands.[7] This Court has repeatedly held far less imposing enactments to preempt the creation of federal common law by federal courts. *See, e.g., Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618 (1978) (involving the Death on the High Seas Act, 46 U.S.C. §§ 761-768, an eight-section statute); *Northwest Airlines, Inc.* v. *Transport Workers*, 451 U.S. 77 (1981) (involving the Equal Pay Act, *one subsection* of the Fair Labor Standards Act, 29 U.S.C. § 206(d), and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, a 17-section statute).

Respondents next quote from a speech from President Washington to the Senecas in 1790 as purported "legislative history" supporting the notion that the Second Congress somehow intended to provide an implied right of action to tribal plaintiffs. Jt. Opp. Br. at 10. Washington's statement, however, could not possibly have referred to cases brought in federal court, as the Second Congress must have known, because tribes were not included within any of the categories of plaintiffs to which the Judiciary Act of 1789 extended original federal court jurisdiction.[8] Indeed, this Court ruled shortly after-

[7] *See* the various Trade and Intercourse Acts, cited in the Counties' petition at 5 n.4.

[8] As Chief Justice Marshall observed in *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 18 (1831):

> At the time the constitution was framed, the idea of appealing to an American court of justice for an assertion of right or a redress of wrong, had perhaps never entered the mind of an Indian or his tribe. Their appeal was to the tomahawk, or to the government. This was well understood by the statesmen who framed the constitution of the

wards on several occasions that there was at the time no federal common law, specifically rejecting any federal common law of ejectment. *See Brown* v. *Van Braam*, 3 U.S. (3 Dall.) 344, 356 (1797); *Sims' Lessee* v. *Irvine*, 3 U.S. (3 Dall.) 425, 457 (1799); *Wheaton* v. *Peters*, 33 U.S. (8 Pet.) 591, 658 (1834).[9]

With respect to the political question issue, respondents' statement that "Congress can better weigh and make a fair adjustment of competing equities than a court of law," Brief in Opposition at 20, is absolutely correct. Respondents neglect, however, to state why that is true. Certainly if this were an ordinary land dispute governed by well-settled principles of law, as respondents elsewhere contend, this dispute would clearly be better resolved through judicial machinery than the political process.

In actuality, however, this is a political problem, which is better left to Congress and the executive branch to resolve. Indeed, this dispute — which has been specifically remitted by statute and treaty to a coordinate political branch for resolution;[10] which necessary involves a political choice among com-

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United States, and might furnish some reason for omitting to enumerate them from among the parties who might sue in the courts of the union.

The Congress that framed the Judiciary Act of 1789 and the initial Trade and Intercourse Acts, of course, included many of the same statesmen.

[9] This is the judicial backdrop of *California* v. *Sierra Club*, 451 U.S. 287 (1981) (where no implied right of action was permitted). *Cf. Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353 (1982) (implied right permitted). Indeed, *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11 (1979) construed statutory language almost identical to that in the Trade and Intercourse Acts as *not* implying a cause of action for damages.

[10] Congress has committed removal remedies to the discretion of the President, and monetary remedies to the Indian Claims Commission. 25 U.S.C. § 180; *Oglala Sioux Tribe of the Pine Ridge Reservation* v. *United States*, 650 F.2d 140 (8th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982). *See also* letter from Commissioner of Indian Affairs to respondents, Supplemental Record App. below at 166-167.

peting "sovereignties"; and which involves the potential for multifarious pronouncements by various branches of the government — is *precisely* the sort of sprawling and unmanageable problem which is most unfit for judicial resolution, and which the political question doctrine is designed to avoid.

In summary, the conclusions of law reached by the court below are indeed novel and warrant review by this Court.

Conclusion.

For the foregoing reasons, and for the reasons set forth in the Counties' petition, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals.

Respectfully submitted,

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